

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 10, 1999 Session

**HOWARD LEVY v. BOARD OF ZONING APPEALS,
WILLIAMSON COUNTY**

**Consolidated Appeals from the Circuit Court for Williamson County
Nos. II-98696 & II-99054 Russ Heldman, Judge**

No. M1999-00126-COA-R3-CV - Filed September 27, 2001

This appeal involves a dispute between neighboring property owners over a storage shed and a swimming pool. After the Williamson County Board of Zoning Appeals authorized one of the property owners to move the storage shed and to construct the swimming pool, the other property owner filed separate petitions for a common-law writ of certiorari in the Circuit Court for Williamson County asserting that the Board had erred by permitting his neighbors to move their storage shed and to construct their swimming pool. The Board moved to dismiss the petitions because they failed to name the neighbors who owned the storage shed and the swimming pool as defendants as required by Tenn. Code Ann. § 27-9-104 (2000). After consolidating the petitions for hearing, the trial court dismissed them on the ground that the petitioning neighbor's failure to name his neighbors as defendants was jurisdictional. We have determined that the petitioning neighbor's failure to comply with Tenn. Code Ann. § 27-9-104 did not affect the trial court's subject matter jurisdiction. We have also determined that the trial court erred by denying the petitioning property owner's motion to amend one of the petitions to cure the failure to comply with Tenn. Code Ann. § 27-9-104. Accordingly, we reverse the order dismissing the petitioning neighbor's petitions for common-law writ of certiorari.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Peter H. Curry, Nashville, Tennessee, for the appellant, Howard Levy.

Kristi D. Earwood, Franklin, Tennessee, for the appellee, Board of Zoning Appeals, Williamson County.

OPINION

I.

Howard and Sue Levy and James and Rhonda Franks live next door to each other on Holly Hill Drive in Williamson County. The Levys' one-acre tract and the sixteen-acre tract owned by Mr.

and Ms. Franks were created as residual lots when the Franks family developed the Redwing Farms Subdivision from property that had been used for agricultural purposes. The Levys' property is assessed as residential; while the property owned by Mr. and Ms. Franks is zoned as a suburban estate and is assessed as agricultural with a residence. The Levys share a common driveway from Holly Hill Drive with Mr. and Ms. Franks, but the Levys' house is closer to the roadway than their neighbors' house. The Levys' property is surrounded on three sides by property owned by Mr. and Ms. Franks.

For some reason not apparent in the record, these neighbors have been embroiled in one controversy after another regarding Mr. and Ms. Franks's use of their property. In late 1997 or early 1998, Mr. Levy complained to the Williamson County Codes Compliance Department that Mr. and Ms. Franks were violating several zoning provisions by constructing a storage shed in a floodplain and by operating Mr. Franks's construction business from their home. In August 1998, Mr. Franks agreed to stop conducting business from the property and to remove the storage shed from the floodplain. The local building authorities also approved Mr. Franks's plan to relocate the storage shed. This plan called for moving the storage shed much closer to the Levys' house and for planting an evergreen buffer along Mr. and Ms. Franks's east property line.

The plan approved by the local building authorities did not suit Mr. Levy. He appealed to the Williamson County Board of Zoning Appeals, claiming that Mr. Franks had misrepresented to the local building officials that the new location of the storage shed was in his backyard when, in fact, it was in his front yard. On September 24, 1998, the Board approved the new location for the storage shed after determining that it was an agricultural structure and, therefore, that Tenn. Code Ann. § 13-7-114 (1999) obviated the need for a building permit or any other sort of approval. Mr. Levy disagreed and, on November 12, 1998, filed a petition for common-law writ of certiorari in the Circuit Court for Williamson County seeking judicial review of the Board's decision. His petition named the Board as the respondent but did not name Mr. and Ms. Franks.

While the battle over the storage shed proceeded, acrimony between the neighbors broke out on another front. In June 1998, Mr. Franks sought and obtained a zoning variance and a building permit to construct a swimming pool on his property. Mr. Levy did not approve of the location of the new pool, and in January 1999, he filed a second petition for common-law writ of certiorari in the Circuit Court for Williamson County, asserting that Mr. and Ms. Franks should not have received a variance for their pool. Just like his first petition, Mr. Levy named the Board as a respondent but again failed to name Mr. and Ms. Franks as defendants.

The Board responded to both of these petitions by moving to dismiss them on the ground that Mr. Levy had failed to comply with Tenn. Code Ann. § 27-9-104, which required that Mr. and Ms. Franks be named as respondents because they had been parties of record in both proceedings before the Board. Mr. and Ms. Franks appeared specially to support the Board's claim that Mr. Levy's petitions should be dismissed for failure to comply with Tenn. Code Ann. § 27-9-104. Soon after being confronted with the motions to dismiss based on Tenn. Code Ann. § 27-9-104, Mr. Levy

moved to amend the petition in the proceeding involving the storage shed to add Mr. and Ms. Franks as respondents.¹

The trial court consolidated the proceedings involving Mr. Levy's two petitions. Following a bench trial, the trial court characterized Tenn. Code Ann. § 27-9-104 as "jurisdictional" and held that it was without jurisdiction to consider either of Mr. Levy's petitions or his motion to amend his first petition because Mr. Levy had failed to name Mr. and Ms. Franks as respondents along with the Board. Mr. Levy appealed, and we have consolidated these two cases because they involve common points of law.

II.

THE TRIAL COURT'S SUBJECT MATTER JURISDICTION

The trial court agreed with the Board's argument that it lacked subject matter jurisdiction over Mr. Levy's petitions because of Mr. Levy's failure to comply with Tenn. Code Ann. § 27-9-104. Although we have addressed the concept of subject matter jurisdiction on numerous occasions, it is apparent that we must, like the English soldiers at Agincourt on Saint Crispin's Day, step once more unto the breach.

Civil courts serve as neutral forums to enable persons who have quarrels with their neighbors to adjust their differences. *Boddie v. Connecticut*, 401 U.S. 371, 391, 91 S. Ct. 780, 793 (1971) (Black, J., dissenting). The concept of subject matter jurisdiction relates to the power of these courts to adjudicate a particular type of case or controversy. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *Turpin v. Conner Bros. Excavating Co.*, 761 S.W.2d 296, 297 (Tenn. 1988); *Cashion v. Robertson*, 955 S.W.2d 60, 63 (Tenn. Ct. App. 1997). It has nothing to do with either the creation or the recognition of substantive legal rights. Rather, it serves as a "limitation on the power of a court to act as a court." Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. Pa. L. Rev. 386, 386 (1932).

The courts derive their subject matter jurisdiction from the Constitution of Tennessee or from legislative act. *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Suntrust Bank v. Johnson*, 46 S.W.3d 216, 221 (Tenn. Ct. App. 2000). They cannot exercise subject matter jurisdiction unless it has been conferred on them explicitly or by necessary implication. *Dishmon v. Shelby State Cmty. College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999). Thus, the parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver. *State ex rel. Dep't of Social Servs. v. Wright*, 736 S.W.2d 84, 85 n.2 (Tenn. 1987); *Caton v. Pic-Walsh Freight Co.*, 211 Tenn. 334, 338, 364 S.W.2d 931, 933 (1963). Judgments and orders entered by courts without subject matter jurisdiction are void. *Brown v. Brown*, 198 Tenn. 600, 610, 281 S.W.2d 492, 497 (1955);

¹We note that both the trial court's order and Mr. Levy's appellate brief refer to an amended petition naming Mr. and Ms. Franks as respondents in the second proceeding involving the swimming pool. The appellate record contains no such amended petition or even a motion to amend the original petition to review the Board's decision to grant Mr. and Ms. Franks a variance for their swimming pool. The only motion to modify found in the record bears the docket number of the proceeding involving the storage shed.

Riden v. Snider, 832 S.W.2d 341, 343 (Tenn. Ct. App. 1991); *Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988).

A court's subject matter jurisdiction in a particular circumstance depends on the nature of the cause of action and the relief sought. *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). Thus, when a court's subject matter jurisdiction is questioned, the court must first ascertain the nature or gravamen of the case and then must determine whether the Constitution of Tennessee, the General Assembly, or the common law have conferred on it the power to adjudicate cases of that sort. Issues involving subject matter jurisdiction are purely questions of law. Accordingly, a trial court's decision regarding its subject matter jurisdiction is not entitled to a presumption of correctness on appeal. *Northland Ins. Co. v. State*, 33 S.W.3d at 729; *Southwest Williamson County Cmty Ass'n v. Saltsman*, No. M2001-00943-COA-R3-CV, 2001 WL 980763, at *3 (Aug. 28, 2001).

Beyond all question, circuit courts have subject matter jurisdiction to issue writs of certiorari to review decisions of local boards of zoning appeals. Not only can this authority be found in Tenn. Code Ann. § 27-8-104(a) (2000), but it can also be found in Tenn. Const. art. VI, § 10. Based on these authorities, the courts have repeatedly upheld a circuit court's exercise of subject matter jurisdiction in cases of this sort. *E.g.*, *Arendale v. Rasch*, 196 Tenn. 374, 268 S.W.2d 102 (1954); *Lafferty v. City of Winchester*, 46 S.W.3d 752 (Tenn. Ct. App. 2000); *Brunetti v. Board of Zoning Appeals of Williamson County*, No. 01A01-9803-CV-00120, 1999 WL 802725 (Tenn. Ct. App. Oct. 7, 1999) (No Tenn. R. App. P. 11 application filed); *Campbell v. Nance*, 555 S.W.2d 407 (Tenn. Ct. App. 1976); *Houston v. Memphis and Shelby County Bd. of Adjustment*, 488 S.W.2d 387 (Tenn. Ct. App. 1972). Accordingly, the Circuit Court for Williamson County has subject matter jurisdiction to issue a writ of certiorari to review a decision of the Williamson County Board of Zoning Appeals.

Concluding that the trial court has subject matter jurisdiction over proceedings to review decisions of the local board of zoning appeals does not end the matter. Parties seeking judicial review of a local board's decision must take the steps required to invoke the court's jurisdiction. *See Randolph & Jenks v. Merchants' Nat'l Bank*, 77 Tenn. 63, 68 (1882) (holding that "[i]t is an elementary principle that the courts can only act upon such matters as are properly brought before them by the parties, according to the settled law, practice and usage"). As one party has put it, "The jurisdiction and power of a court remain at rest until called into action by some suitor; it cannot by its own act institute a proceeding sua sponte. The action of a court must be called into exercise by pleading and process . . . by some suitor . . . requesting the exercise of the power of the court." Timothy Brown, *Commentaries on the Jurisdiction of Courts* § 2a (2d ed. 1901).

III.

COMPLIANCE WITH TENN. CODE ANN. § 27-9-104

The Board convinced the trial court to dismiss both of Mr. Levy's petitions for common-law writ of certiorari because of his failure to comply with Tenn. Code Ann. § 27-9-104. Mr. Levy concedes that his original petitions did not comply with Tenn. Code Ann. § 27-9-104 but insists that the trial court erred by refusing to permit him to amend them to correct the oversight. We agree that Mr. Levy's failure to name Mr. and Ms. Franks as defendants should not prevent him from obtaining judicial review of the Board's decisions. Tenn. R. Civ. P. 19.01 and 21 provide a basis for

permitting Mr. Levy to amend his petition even though the deadline for filing petitions for common-law writ of certiorari had passed.

A.

The issues in this appeal relating to the procedural requirements for filing a common-law writ of certiorari mirror those that have been raised involving the requirements for filing a notice of appeal under Tenn. R. App. P. 4(a) and a petition for judicial review under Tenn. Code Ann. § 4-5-322 (1998). Our decisions with regard to notices of appeal and petitions for judicial review light our path in this case. Chief among the principles undergirding these decisions is the principle that procedural rules should be construed to enhance, rather than impede, the search for justice and to avoid legal technicalities and procedural niceties. *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001); *Johnson v. Hardin*, 926 S.W.2d 236, 238-39 (Tenn. 1996). Thus, in the absence of prejudice, procedural rules should not be used to thwart the consideration of cases on their merits. *Davis v. Sadler*, 612 S.W.2d 160, 161 (Tenn. 1981); *Wallace v. Wallace*, 733 S.W.2d 102, 106 (Tenn. Ct. App. 1987); Tenn. R. App. P. 1; Tenn. R. Civ. P. 1.

The basic procedural framework for seeking judicial review using a common-law writ of certiorari can be found in Tenn. Code Ann. §§ 27-9-101, -114 (2000). *Fairhaven Corp. v. Tennessee Health Facilities Comm'n*, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1976). In the absence of procedures required by another statute or private act, Tenn. Code Ann. § 27-9-102 requires that petitions for both common-law and statutory writs of certiorari be filed within sixty (60) days from the entry of the order or judgment for which review is sought. The purpose of this provision is to promote the timely resolution of disputes by establishing filing deadlines that will keep cases moving through the system. *State ex rel. Sizemore v. United Physicians Risk Retention Group*, ___ S.W.3d ___, ___, 2001 WL 360698, at *6 (Tenn. Ct. App. Apr. 12, 2001) (discussing the purpose of deadlines generally).

Tenn. Code Ann. § 27-9-102's deadline has been analogized to the deadline for filing a notice of appeal under Tenn. R. App. P. 4(a). *Thandiwe v. Traugher*, 909 S.W.2d 802, 804 (Tenn. Ct. App. 1994). Accordingly, like a notice of appeal, failure to file a petition for common-law writ of certiorari within the time required by Tenn. Code Ann. § 27-9-102 causes the party filing the petition to forfeit its right to seek judicial review and requires the courts to decline to exercise their jurisdiction to grant the writ because the petition is time-barred. *A'la v. Tennessee Dep't of Corr.*, 914 S.W.2d 914, 916 (Tenn. Ct. App. 1995) (holding that a petition filed longer than sixty days after a final order is not timely filed); *Brannon v. County of Shelby*, 900 S.W.2d 30, 34 (Tenn. Ct. App. 1994) (holding that a petition not filed within sixty days is time-barred).

A second procedural requirement relating to common-law writs of certiorari is found in Tenn. Code Ann. § 27-9-104, which requires the petitioner to "name as defendants the particular board or commission and such other parties of record, if such, as were involved in the hearing before the board or commission" Like the parties in cases appealed in accordance with Tenn. R. App. P. 4(a) or petitions for review under Tenn. Code Ann. § 4-5-322, the parties in a certiorari proceeding

are the same as the parties before the lower court or the administrative board or agency.² By virtue of their prior involvement, they are already aware of the dispute. The chief purpose of provisions such as Tenn. Code Ann. § 27-9-104 is to provide the affected parties with notice that the courts have been asked to review the lower court's or agency's decision. *See Legate v. John Ward & Co.*, 45 Tenn. (5 Cold.) 451, 453 (1868); *United Steelworkers of Am. v. Tennessee Air Pollution Control Bd.*, 3 S.W.3d at 473.³

In other contexts, parties seeking to frustrate judicial review of a lower court's decision have argued unsuccessfully that a timely filed notice of appeal does not confer jurisdiction on the reviewing court if the notice or petition fails to comply with all other technical requirements. Accordingly, once a timely notice of appeal has been filed, the courts have declined to use the procedural rules to erect formalistic barriers to considering an appeal on its merits. *Cobb v. Beier*, 944 S.W.2d 343, 345-46 (Tenn. 1997) (reversing the dismissal of an appeal because the appellant had failed to serve a copy of its notice of appeal on the appellate court clerk as then required by Tenn. R. App. P. 5(a)); *Johnson v. Hardin*, 926 S.W.2d at 240 (reversing the dismissal of an appeal because the appellant had failed to comply with Tenn. R. App. P. 24(a)'s requirements for using less than a full record on appeal).

The courts have adopted a similar approach with regard to petitions for review. We have held that Tenn. Code Ann. § 4-5-322 does not require that all parties to an administrative proceeding be named as parties in the petition for review. *Schering-Plough Healthcare Prods., Inc. v. State Bd. of Equalization*, 999 S.W.2d at 776-77; *Batson East-Land Co. v. Boyd*, 4 S.W.3d at 188. We have also held that Tenn. Code Ann. § 4-5-322 does not require the issuance of summonses, *Jaco v. Department of Health, Bureau of Medicaid*, 950 S.W.2d at 353, and that Tenn. Code Ann. § 4-5-322 does not require a timely filed petition for review to be served on the parties prior to the sixty-day filing deadline. *Schering-Plough Healthcare Prods., Inc. v. State Bd. of Equalization*, 999 S.W.2d at 777; *United Steelworkers of Am. v. Tennessee Air Pollution Control Bd.*, 3 S.W.3d at 474.

²The procedures for petitions for review under Tenn. Code Ann. § 4-5-322 are comparable to those for notices of appeal under Tenn. R. App. P. 4(a). *Schering-Plough Healthcare Prods., Inc. v. State Bd. of Equalization*, 999 S.W.2d 773, 776 (Tenn. 1999); *Batson East-Land Co. v. Boyd*, 4 S.W.3d 185, 188 (Tenn. Ct. App. 1998). Like an appeal governed by Tenn. R. App. P. 4(a) and a petition for review governed by Tenn. Code Ann. § 4-5-322, a petition for common-law writ of certiorari is a continuation of the proceeding that was originally commenced in the lower court or administrative board or agency. Its purpose is to provide judicial review of these proceedings. *Tennessee Cent. R.R. v. Campbell*, 109 Tenn. 640, 647, 75 S.W. 1012, 1013 (1903). The parties to the proceeding in the lower court or the administrative board or agency have already been determined and are of record by the time the petition for common-law writ of certiorari is filed. *See Schering-Plough Healthcare Prods., Inc. v. State Bd. of Equalization*, 999 S.W.2d at 776-77 (construing a Tenn. Code Ann. § 4-5-322 petition for review); *Jaco v. Department of Health, Bureau of Medicaid*, 950 S.W.2d 350, 352 (Tenn. 1997) (same); *Batson East-Land Co. v. Boyd*, 4 S.W.3d at 188 (same). These parties are, by operation of law, parties to the certiorari proceeding. *See United Steelworkers of Am. v. Tennessee Air Pollution Control Bd.*, 3 S.W.3d 468, 472 (Tenn. Ct. App. 1998) (construing a Tenn. Code Ann. § 4-5-322 petition for review).

³In cases of this sort, the local board or agency whose decision is being reviewed is primarily responsible for defending its actions. Requiring that the parties to the proceedings be notified or named as parties is not intended to assist the board or agency to defend itself.

B.

Lawyers should comply with all the technical procedural requirements for filing petitions for a common-law writ of certiorari to avoid placing their clients in an imbroglio such as the one in which Mr. Levy currently finds himself. Mr. Levy's lawyer did not comply fully with Tenn. Code Ann. § 27-9-104. This oversight, however, should not provide the Board with a basis for evading judicial review of its decisions. The Board has not demonstrated that it was prejudiced by Mr. Levy's failure to name Mr. and Ms. Franks as defendants in his original petitions or by Mr. Levy's failure to serve copies of his petitions on Mr. and Ms. Franks.⁴ Accordingly, the trial court should have held that the timely filing of the two petitions naming only the Board as a defendant was sufficient compliance with Tenn. Code Ann. § 27-9-102 to invoke its jurisdiction under Tenn. Code Ann. § 27-8-104(a) to review the Board's decisions.

We reached a similar conclusion approximately fifteen years ago in an appeal involving a certiorari proceeding to review a disciplinary decision of the Shelby County Civil Service Board. After the board reversed the employee's ninety-day suspension, the county filed a timely petition for common-law writ of certiorari in the Chancery Court for Shelby County. However, the county did not fully comply with Tenn. Code Ann. § 27-9-104 because it named the board as a defendant but did not name the employee. Several months after filing the petition, long after the deadline for filing the certiorari petition had expired, the county cured its oversight by amending its petition to name the employee as a defendant along with the board. When the employee argued that the county's petition was not timely filed because it had not fully complied with Tenn. Code Ann. § 27-9-104, the court stated that the petition was timely and that the county's later amendment cured the problem with Tenn. Code Ann. § 27-9-104. *Shelby County Gov't v. Taylor*, Shelby Eq. No. 40, 1986 WL 13430, at *4 (Tenn. Ct. App. Dec. 1, 1986) (No Tenn. R. App. P. 11 application filed).

Our decision in *Shelby County Gov't v. Taylor* is consistent with the decisions of other state courts in cases similar to the one before us. While these decisions are not unanimous, the prevailing, and in our judgment better reasoned, view is that a timely filed petition for common-law writ of certiorari naming a local board as a defendant is sufficient to invoke the court's jurisdiction and that a failure to name one of the parties to the proceeding before the local board could be cured by a later amendment. *Preston v. Board of Adjustment*, 772 A.2d 787, 790 (Del. 2001); *State ex rel. Sweet v. Village of Jemez Springs, Inc. City Council*, 837 P.2d 1380, 1383 (N.M. Ct. App. 1992); *Board of Supervisors v. Board of Zoning Appeals*, 302 S.E.2d 19, 20 (Va. 1983); *County of Rusk v. Rusk Bd. of Adjustment*, 585 N.W.2d 706, 708-09 (Wis. Ct. App. 1998).⁵ Accordingly, we find that the trial court erred by determining that Mr. Levy's failure to comply fully with Tenn. Code Ann. § 27-9-104 deprived it of jurisdiction to consider his petitions for common-law writs of certiorari.

⁴The Board has not argued that the absence of Mr. and Ms. Franks in this proceeding will somehow undermine its ability to defend its decisions regarding their storage shed or their pool.

⁵But see *Richter v. City of Greenwood Village*, 577 P.2d 776, 777 (Colo. Ct. App. 1978); *North Street Ass'n v. City of Olympia*, 635 P.2d 721, 725-26 (Wash. 1981).

C.

Failing to name the successful applicant for a variance as a defendant as required by Tenn. Code Ann. § 27-9-104 is akin to failing to join a necessary party in a civil proceeding.⁶ This sort of oversight does not amount to a jurisdictional defect. *Crosby v. City of Spokane*, 971 P.2d 32, 40 (Wash. 1999). Thus, instead of dismissing the petition, the remedy for nonjoinder is to direct the petitioner to cure the oversight by joining the necessary party or parties. *Citizens Real Estate & Loan Co. v. Mountain States Dev. Corp.*, 633 S.W.2d 763, 766 (Tenn. Ct. App. 1981).

Certiorari proceedings such as the one involved in this case should not be permitted to proceed until all the parties to the proceeding before the local board, including the landowner who has obtained the variance, license, or certificate, have been made parties and are before the court. Tenn. R. Civ. P. 19.01, 21, and 24 provide two vehicles for bringing necessary parties before the court. First, the trial court may add a necessary party on motion of one of the parties or on its own motion. Second, the trial court may permit a necessary party to intervene in the proceeding.

Joining additional parties, other than the local board or agency whose decision is being reviewed, is not subject to the relation-back requirements of Tenn. R. Civ. P. 15.03. Certiorari proceedings such as this one do not involve claims against the property owner or the other affected parties, but rather are challenges to the local board's decision. The purpose of Tenn. Code Ann. § 27-9-104 is to assure that all persons whose interests could be affected by the proceeding have notice and an opportunity to be heard. Accordingly, the trial court should grant petitions to amend petitions for common-law writs of certiorari to add omitted, but necessary parties, as long as these parties have not been prejudiced and have been afforded adequate time to prepare and present their case. *See United Steelworkers of Am. v. Tennessee Air Pollution Control Bd.*, 3 S.W.3d at 473-74 (holding that notice of the filing of a Tenn. Code Ann. § 4-5-322 petition for review was adequate as long as the party receiving notice has sufficient time to prepare and be heard).

Mr. and Ms. Franks were obviously aware of the proceedings before the Williamson County Board of Zoning Appeals involving their storage shed and pool. After all, they had requested the variance to construct their pool, and they had actively worked with the local officials involving the relocation of their storage shed. They actively participated in the Board's meetings, and they were also fully aware that Mr. Levy was seeking judicial review of the Board's decisions. While they were not named as defendants by Mr. Levy and were not served with the original petitions, their lawyer received the motions and other papers filed by the parties in the trial court.⁷ Their lawyer even entered a special appearance in the trial court to support the Board's motion to dismiss Mr. Levy's petitions for failure to comply fully with Tenn. Code Ann. § 27-9-104. Thus, Mr. and Ms. Franks were not caught unaware when Mr. Levy moved to add them as defendants.

⁶Other state courts have differed regarding whether the landowner is a necessary or indispensable party in cases of this sort. We need not address this question because Tenn. Code Ann. § 27-9-104 requires landowners to be named as parties. Therefore, they are, by statute, necessary.

⁷As early as February 10, 1999, the Board's lawyer included the lawyer representing Mr. and Ms. Franks in the certificate of service on papers she filed with the court.

As owners of the affected property, Mr. and Ms. Franks were necessary parties to these proceedings. Thus, they should have been named as defendants in accordance with Tenn. Code Ann. § 27-9-104, and they should have the opportunity to participate in the judicial review of the Board's proceedings. The record contains no indication that granting Mr. Levy's motion would have delayed the proceedings or would have hampered the Board's ability to defend its decision. Likewise, there is no basis for concluding that making Mr. and Ms. Franks party defendants would have prejudiced their ability to participate effectively in any future hearing regarding Mr. Levy's petitions.⁸ Accordingly, under the facts of this case, the trial court erred by denying Mr. Levy's motion to amend his petition seeking judicial review of the Board's decision to permit Mr. and Ms. Franks to move their storage shed.⁹

IV.

We reverse the order dismissing the petitions for common-law writ of certiorari and remand the cases to the trial court for further review and action consistent with this opinion. Even though Mr. Levy has prevailed on this appeal, the appeal would not have been necessary had Mr. Levy complied with the clear requirements of Tenn. Code Ann. § 27-9-104. Accordingly, pursuant to Tenn. R. App. P. 40(a), we tax the costs of this appeal to Howard Levy and his surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

⁸The trial court had not scheduled a hearing on Mr. Levy's petition involving the storage shed when Mr. Levy filed his motion to amend his petition to add Mr. and Ms. Franks as defendants.

⁹We express no opinion regarding Mr. Levy's second petition involving the Board's decision to grant Mr. and Ms. Franks a variance to build their swimming pool. This motion, if it was ever filed, is not in the record. Suffice it to say that any motion to amend this petition should be decided using the same standards used to consider the motion to amend the petition involving the storage shed.